IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-292

JAMES H. ASHLEY AND PAT MALONEY,
Petitioners,

VERSUS

AMERICAN TELEPHONE & TELEGRAPH COMPANY, ET AL.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

LAW OFFICES OF PAT MALONEY, INC.
Pat Maloney
Jack Pasqual
2001 Frost Bank Tower
San Antonio, Texas 78205

ATTORNEYS FOR PETITIONER

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San Antonio, Texas 78205

Attorneys for Petitioners

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioners, JAMES H. ASHLEY and PAT MALONEY, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, at New Orleans, Louisiana, which final judgment was rendered, on Petition for Rehearing, on the 8th day of June, 1976 by the Honorable Justices Tuttle, Thornberry and Tjoflat, Circuit Judges. The Order of June 8, 1976 is a final judgment of the United States Court of Appeals and said Order refused to review the judgment of that Court affirming the judgment of the United States District Court for the Western District of Texas, San Antonio Division.

OPINIONS BELOW

(1) The opinion of the United States Court of Appeals for the Fifth Circuit is set forth in 529 F. 2d 694.

(2) There is appended to this Petition a copy of the aforesaid opinions delivered upon the rendering of the Judgment or Decree sought to be reviewed in this case, as provided by Supreme Court Rule 23 (i).

GROUNDS OF JURISDICTION

(i) The date of the Judgment or Decree sought to be reviewed and the time of its entry is April 2, 1976.

(ii) The date of Order respecting Rehearing is June 8, 1976.

(iii) The statutory provision believed to confer upon this

Supreme Court jurisdiction to review the Judgment or Decree in question by writ of certiorari is Title 28 U.S.C. Sec. 254(1).

QUESTIONS PRESENTED

The Order sought to be reviewed is an appeal by a non-party witness and his attorney from an order of the District Court holding each of them in contempt of Court, fining them Five Hundred ($500.00) Dollars per day for contempt, and imposing sanctions in the sum of Two Thousand ($2,000.00) Dollars. The Order is based upon the allegedly contemptuous acts of the Petitioners in declining to testify at an oral deposition. The Petitioners did appear at the deposition pursuant to subpoena, but abstained from testifying, because the Trial Court's order refusing Ashley a stay pending appeal was being presented to the Appellate Court, pursuant to the Federal Rules of Appellate Procedure. Notwithstanding the appeal by Petitioners, they were cited for contempt and both were adjudged guilty of contumacious and contemptuous conduct, fined and subjected to sanctions. An appeal resulted. Should the Trial Court's Order be permitted to stand, it sets a precedent for the tenet ~~tenant~~ that if one resorts to his right of appeal he stands in jeopardy of contempt for resorting to such constitutional right.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V to the Constitution of the United States of America proscribes the action taken by the District Court in this case, which deprives Petitioners of life, liberty or property without due process of law.

Further, Rule 26(c), Federal Rules of Civil Procedure, provides that a person from whom discovery is sought may for

good cause shown secure an order which justice requires to protect the person from annoyance, embarrassment, oppression or undue burden. Said Rule is involved in this case.

Rule 37(d), Federal Rules of Civil Procedure, provides that a Court may impose sanctions and make such Orders as are just when a deponent *fails to attend* a deposition. That Rule is involved in this case, and it is undisputed that the Petitioners hereto attended the deposition.

The First Amendment to the Constitution of the United States of America protects vigorous advocacy, and such Amendment is involved in this appeal.

STATEMENT OF THE CASE

Petitioner Ashley and his counsel, Petitioner Maloney, were not involved directly in this litigation. Petitioner Ashley was a non-party witness, who was served with a lengthy subpoena duces tecum and notice to give his deposition in this cause on November 20, 1974, the deposition being scheduled for November 26, 1974 (Tr. 257). Petitioner Ashley was required to bring with him and produce at the deposition a multitude of documents including ". . . all notes and memoranda relating to the allegations in the Petition filed by you in the 57th Judicial District Court, Bexar County, Texas as No. 74-CI-13523, exclusive of notes and memoranda of your attorney as part of his 'work product' (Tr. 28)." Petitioners timely moved to quash the subpoena to testify and produce documents; they requested a protective Order from the District Court; and they made objections to the subpoena, all pursuant to the Federal Rules of Civil Procedure (Tr. 259). Petitioners likewise moved to defer the taking of the deposition of the witness Ashley (Tr. 261). On November 26, 1974, that relief was denied by the Trial Court and the deposition was rescheduled for December

16, 1974 (Tr. 262).

Petitioner Ashley timely perfected his appeal from the Order denying his Motion To Quash Subpoena to Testify and Produce Documents, his Motion for Protective Order, and his Objections To The Subpoena (Tr. 265); and on December 4, 1974, moved the District Court for a stay of such Order pending appeal to the Fifth Circuit (Tr. 266). The Plaintiffs in the case responded to witness Ashley's Motion for stay of order pending appeal contending that even though he is a non-party witness, the Court's Order was not appealable (Tr. 269). The Defendants again moved to defer the taking of the deposition of Petitioner Ashley (Tr. 270). Ashley, relying on *Covey Oil Company v. Continental Oil Company*, 340 F. 2d. 963 (1965), contended that as a non-party witness he had no other relief from the Court's Order but to appeal (Tr. 272). On December 13, the Trial Judge overruled Ashley's motion for stay of order pending appeal (Tr. 275).

The order of the District Judge overruling motion for stay of order pending appeal (Tr. 275) was dated on *Friday*, December 13, 1974. The deposition was scheduled for the *following Monday*, December 16, 1974, at 10:00 o'clock a.m. (Tr. 262). On *Sunday*, the day before the deposition, Jack Pasqual, an associate of Petitioner Maloney, happened to be in the office and discovered the Court's Order Denying Motion For Stay Of Order Pending Appeal. This information was communicated to Petitioner Maloney and it was determined that an immediate appeal from said order, pursuant to Rule 8, Federal Rules of Appellate Procedure, should be promptly presented to the Honorable United States Court of Appeals for the Fifth Circuit. The Motion For Stay Pending Appeal was prepared at 7:30 o'clock a.m. on the day of the deposition, December 16, 1974, and promptly dispatched by United States mail to the Fifth Circuit with an information copy delivered to the United States District Clerk for the Western District of Texas, prior to the

10:00 o'clock a.m. deposition (Tr. 281).

Petitioners *both appeared at the deposition*, and informed counsel that they were filing a motion to stay pending appeal, and respectfully declined to testify, pending a resolution of that appeal (Ex. "A", page 8, 10). The same day, San Antonio Telephone Company, Inc., et al., presented a Motion For Show Cause Order directed to James H. Ashley, which application was unsworn (Tr. 277), and the Trial Judge issued his Show Cause Order to Petitioner Ashley requiring him to be before the Court four days later to show cause why he should not be punished for contempt (Tr. 279). On December 18, 1974, the Trial Court, *sua sponte*, ordered Attorney Maloney to likewise appear on December 20, and show cause why he should not be held in contempt for the same reason (Tr. 280). On December 19, 1974, both Petitioners filed their verified reply to the Court's Order to Show Cause, and in said response, the witness Ashley was tendered fully for deposition (Tr. 281).

On December 30, 1974, the Trial Court conducted its hearing on the show cause, and found both Petitioners guilty of contempt, fined them each Five Hundred ($500.00) Dollars per day, and assessed sanctions in the sum of Two Thousand ($2,000.00) Dollars, (R. 46, 52). As noted by the testimony and brief, there was never an attempt to escape deposition, but only to be given reasonable time for preparation. The Trial Court's obfuscation on this significant point has caused this costly and unnecessary appeal.

ARGUMENT

The honorable Court of Appeals has rendered a decision in this case which conflicts with prior decisions of that Court of Appeals, and decisions of other Courts of Appeals on the same matter and has decided a Federal question and a weighing

conflict with applicable decisions of the Supreme Court of the United States. Petitioners further respectfully submit that the District Court and the United States Court of Appeals have so far departed from the accepted and usual course of judicial proceedings, as to call for an exercise of United States Supreme Court power of supervision in this case.

The decision of the District Judge, affirmed by the Fifth Circuit, directly conflicts with the rationale, holding and decision of this honorable Supreme Court in *Manness, Petitioner v. Meyers, Presiding Judge*, 95 S. Ct. 584 (1975). No. 73-689. In that case, as in the case at bar, the Record shows no indication whatsoever of contumacious conduct on the part of Petitioner Maloney or Petitioner Ashley. The District Court appears to have been offended, in a strictly legal sense, only by the lawyers' advice which caused his clients to decline to testify on perfectly valid grounds. There is nothing in the Record to suggest that the Petitioners acted other than in good faith, pending disposition of what they believed to be a valid appeal.

Chief Justice Fuller, speaking for the United States Supreme Court in 190 U.S. at 32, 23 S. Ct. at 726, stated:

> "In the ordinary case of advice to clients, if an attorney acts in good faith and in the honest belief that his advice is well-founded and in the just interests of his client, he cannot be held liable for error in judgment. The preservation of the independence of the bar is too vital to the due administration of justice to allow the application of any other general Rule." 190 U.S. at 29, 23 S. Ct. at 725.

Petitioners respectfully submit that they are not subject to the penalty of contempt for their good faith belief and there is no contention at the case at bar that there is any lack of good faith.

Counsel was at all times attempting to represent his client within the bounds of the rules, and within ethical standards of professional conduct. The power to punish an attorney for contempt is one which must be used sparingly, and only when it is clearly demonstrated that the lawyer's conduct is contumacious and tends to bring the administration of justice into disrepute, in contrast to a competent and responsible practitioner, who is acting respectfully to the Court under considerable pressure in the prospect of a lengthy and important trial. *Parmelee Transportation Company v. Keeshin*, 294 F. 2d. 310 (C.A. Ill. 1961) reversed on other grounds, 82 S. Ct. 1288, 370 U.S. 230, 8 L. Ed. 2d. 434; *Collins v. United States*, 269 F. 2d. 745 (C.A.L. cert. den. 80, S. Ct. 662, 362 U.S. 912, 4 L. Ed. 2d. 620).

The Trial Court should have treated Ashley as Chief Justice Reeves of the Western District of Missouri did in *Colorado Mining and Elevator Company v. American Cyanamid Company*, 11 F.R.D. (W.D. Missouri, 1951). In the cited case, Justice Reeves held:

> "No punishment should be inflicted for the refusal to answer. The witness was advised by his counsel not to answer or produce the documents, as counsel sincerely believed that they should not be produced."
>
> "It is the order of the Court, therefore, that the witnesses produce the documents sought."

In this case, your Petitioners upon being apprised by the Fifth Circuit that their Motion to stay pending appeal was denied, did immediately agree to produce the testimony. The *right* of appeal is the aspect the Trial Court ignored.

In *Steamship Company of 1949 v. China Union Lines, et al.*, 123 F. Supp. 802, a motion for contempt to a non-party

witness who refused on the advice of counsel to produce certain documents called for in a subpoena, was denied. That case is analogous to the one at bar. The learned District Judge, in refusing to hold the witness in contempt, stated as follows:

> "I hesitate, under the circumstances here, to impose the drastic relief sought. Mr. Cohan's refusal to produce the documents was by advice of counsel. I have a discretion here which I feel I should exercise. After all, the end to be accomplished is the production of the documents. I, therefore, *hold in abeyance the motion to punish for contempt* and I direct that Mr. Cohan and through him the brokerage corporation to appear before a notary public who is taking the deposition within thirty days from the date of the entry of the order to be entered herein and produce such as the documents specifically set forth and described in the subpoenas as they have in their possession or under their control. *In other words, I direct them to obey the subpoenas.* I fix the date tentatively as April 30, 1954." (Emphasis supplied).

In the case at bar, as in the *Steamship* case, the end to be accomplished is the testimony of the witness. The witness and the documents were proferred for testimony *prior to the hearing on the contempt.*

In 9 *Fed. Pract.* Section 2462, at page 450, the general rule is stated that:

> "The Courts have been very lenient and ordinarily have required production but refused to punish a client who has acted on his attorney's advice."

Petitioner Maloney respectfully submits that his advice to his client was a good faith and competent decision based upon an honest belief that Rule 8, Federal Rules of Appellate

Procedure was appropriate and available. A contrary opinion of the Trial Court does not render it otherwise.

There are numerous cases holding that an attorney has the *right* and duty to advise his client as to the validity of an order of Court which affects his client's interest and that such advice if given in good faith, will not render him liable for contempt because of an error in judgment. *Anderson v. Comptois*, 109 F. 971 (9th Cir.) states as follows:

> "There can be no question as to the right of an attorney to advise his client as to the validity of an order of court or of a writ issued under its authority, where such order or writ affects the client's interest; and if, after investigation, it is the attorney's honest belief that such order or writ is illegal and void, his advice to that effect will not render him liable for an error of judgment". (At page 974).

The *Anderson* case naturally proscribes the attorney from corruptedly conspiring with his client to obstruct the due administration of the law. There is no suggestion, nor could there be, of any contemptuous action on the part of counsel in this case. To the contrary, his advice to his client, as reflected in affidavit of Pat Maloney on file herein, was that the client "respectfully declined to give further testimony with reference to the deposition *because you feel that you are here only to show that you are not contemptuous of the subpoena, but, rather, to inform counsel that you are here in obedience to it, however, you don't purpose to testify further on any other subject because you don't feel that you are validly here considering your appeal is pending, and considering the pending of the Motion to Stay*". (Deposition of James H. Ashley, page 10, emphasis supplied).

In *Leber v. United States*, 170 F. 881 (9th Circuit), the following statement is found:

"The Defendant further justifies his conduct on the ground that he acted in good faith as an attorney in advising Leber that he was under no legal obligations to attend before the notary public notwithstanding the fact that he had been served with a subpoena to do so.

"In the case of *In Re Dubose*, 109 F 971, 974, 48 CCC 14, this Court said:

> 'There can be no question as to the right of an attorney to advise his client as to the validity of an order of court or of a writ issued under its authority, where such an order or writ affects the client's interest; and if after investigation, it is the attorney's honest belief that such order or writ is illegal and void, his advice to that effect will not render him liable for an error of judgment but an attorney cannot go beyond the right to advise and, actuated by a spirit of resistance, conspire with his client or others to disobey an order of the court, obstruct the due administration of the laws, and bring the authority of a Court of Justice into contempt."

Petitioner Maloney respectfully submits that he was at no time actuated by a "spirit of resistance" nor did he "conspire with his client or with others to disobey an order of Court, obstruct the due administration of the laws, and bring the authority of a Court of Justice into contempt." To the contrary, counsel, having been apprised by the Clerk of the United States Court for the Fifth Circuit that motion to stay pending appeal pursuant to Federal Rule 8 had been denied, promptly advised his client to fully testify and client has done so.

In *United States of America v. David R. Schrimsher, In Re Charles D. Butts, Attorney at Law, Appellant*, 493 F. 2d. 842, the Fifth Circuit reversed a conviction of an attorney for contempt, stating:

> "Conviction for contempt of court could also have serious adverse career consequences for Butts. His conviction could provide a basis for disciplinary action by a bar association. Opportunities for appointment to the Bench or to other high office might be foreclosed as a result of this blot upon his record. The conviction might damage Butts' reputation in the legal community, and this in turn might affect his ability to attract clients and to represent them effectively, especially in open Court. In light of these possible collateral consequences, Butts' appeal is not 'abstract, feigned or hypothetical' so as to justify dismissal for mootness."

It is conscientiously advanced that just as counsel acted with decorum and respect in the *Butts* case, so did Counsel here.

It is exceedingly important that this Honorable Court consider the time factors presented to counsel in making the "judgment call" presented. As hereinabove noted, it was only happenstance which led to the discovery of the Trial Judge's Order Refusing Delay Pending Appeal. Petitioners respectfully submit that their conduct could not be contemptuous, when *less than twenty-four hours elapsed from the time of receipt of the Court's order denying stay pending appeal until notice was prepared and dispatched to the Fifth Circuit* and, of course, the deposition itself was scheduled at 10:00 o'clock a.m. the following day.

The Trial Court was indeed in serious error in this case in the free exchange of necessary and irreplaceable aspects of advocacy, and his ruling, if allowed to stand, would seriously inhibit the rights of all future clients and counsel to follow. The modest balance that now exists with reference to bench and bar must not be eroded by this serious misuse of judicial power.

PRAYER

WHEREFORE, Petitioners respectfully pray that a Writ of Certiorari be issued out of and under the seal of this honorable Court, directed to the United States Court of Appeals for the Fifth Circuit, and to all parties hereto, granting all relief to which these Petitioners may be entitled, at law or in equity.

Respectfully submitted,

LAW OFFICES OF PAT MALONEY, INC.
Pat Maloney
Jack Pasqual

2001 Frost Bank Tower
San Antonio, Texas 78205

By Pat Maloney per m.a.s.
Pat Maloney

Attorneys for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that on this the 6th day of September, 1976, a copy of Petition for Writ of Certiorari to the United States Court of Appeals, for the Fifth Circuit, New Orleans, Louisiana, was served upon Mr. Hubert Green, 900 Alamo National Building, San Antonio, Texas; and Mr. Joel Westbrook, 1910 National Bank of Commerce Building, San Antonio, Texas 78205, by deposit in the United States Mail, Return Receipt Requested with adequate postage thereon.

Pat Maloney per m.g.s.
Pat Maloney

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Filed: June 8, 1976

No. 74-4163

SAN ANTONIO TELEPHONE COMPANY, INC., ET AL.,
Plaintiffs-Appellees,

versus

AMERICAN TELEPHONE & TELEGRAPH COMPANY, ET AL.,
Defendants,

JAMES H. ASHLEY, ET AL.,
Appellants.

Appeals from the United States District Court for the
Western District of Texas

ON PETITION FOR REHEARING
(JUNE 8, 1976)

Before TUTTLE, THORNBERRY and TJOFLAT, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed on behalf of JAMES H. ASHLEY, ET AL. in the above entitled and numbered cause be and the same is hereby DENIED.

Form 703-2

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1975

No. 74-4163

D.C. Docket No. CA - SA72-330

SAN ANTONIO TELEPHONE COMPANY, INC., ET AL.,
Plaintiffs-Appellees,

versus

AMERICAN TELEPHONE & TELEGRAPH COMPANY, ET AL.,
Defendants,

JAMES H. ASHLEY, ET AL.,
Appellants.

Appeals from the United States District Court for the
Western District of Texas

Before TUTTLE, THORNBERRY and TJOFLAT, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that appellants pay to plaintiffs-appellees, the costs on appeal to be taxed by the Clerk of this Court.

April 2, 1976

Issued as Mandate:

SAN ANTONIO TELEPHONE COMPANY, INC., et al.,
Plaintiffs-Appellees,

v.

AMERICAN TELEPHONE & TELEGRAPH COMPANY et al., Defendants,

James H. Ashley, et al., Appellants.

No. 74-4163.

United States Court of Appeals,
Fifth Circuit.

April 2, 1976.

The United States District Court for the Western District of Texas, John H. Wood, Jr., J., found a witness and his attorney in contempt for failing to comply with a subpoena duces tecum. Contemnors appealed. The Court of Appeals held that the contemnors' expectation of obtaining a stay of the order either from the trial court or from the Court of Appeals did not excuse their failure to comply.

Affirmed.

1. Federal Civil Procedure ⇐1636

Witness' and his attorney's expectation of obtaining stay of order to appear and produce records either from trial court or from Court of Appeals did not excuse failure to comply.

2. Contempt ⇐74

After holding party in civil contempt for failure to comply with court order, trial court had discretion to order payment by contemnor of out-of-pocket expenses of other party occasioned by failure to comply with court's order and proceeding to bring about end to failure or refusal.

Appeals from the United States District Court for the Western District of Texas.

Before TUTTLE, THORNBERRY and TJOFLAT, Circuit Judges.

PER CURIAM:

[1] This appeal deals only with a judgment of civil contempt against a recalcitrant witness in discovery proceedings and his counsel who advised him not to comply with the trial court's order to appear and produce records. The order appealed from recited the fact that the witness and counsel had failed and refused to appear and testify and produce documents in accordance with the command of a subpoena duces tecum. It is undisputed that this finding is correct. The contemnors excuse their conduct only by showing that they expected to obtain a stay of the order either from the trial court or from this Court pending appeal. This will not do. In *Maness v. Meyers*, 419 U.S. 449, 95 S.Ct. 584, 42 L.Ed.2d 574 (1975), the Supreme Court said:

> We begin with the basic proposition that all orders and judgments of courts must be complied with promptly. If a person to whom a court directs an order believes that order is incorrect the remedy is to appeal, but absent a stay, to comply promptly with the order pending appeal.

Id. at 458, 95 S.Ct. at 591, 42 L.Ed.2d at 583.

[2] Here the court imposed a penalty of $500 per day for each day that the contemnors should continue in contempt, then determined that they were in compliance and suspended the imposition of the fine "so long as the aforesaid tender of testimony and documents continues;"

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the court then ordered that "so long as the aforesaid tender of testimony and documents continues, the Respondents . . . are deemed purged of the contempt heretofore found and adjudged." The court then determined upon receipt of testimony that counsel for plaintiffs "have incurred in connection with these contempt proceedings cost, expenses, and fees in the reasonable amount of not less than Two Thousand and no/100 ($2,000.00) Dollars." Thereupon the court ordered that the witness and his counsel pay to counsel for plaintiffs the sum of $2000.00 "as sanctions, and not penalty, and as compensation for their cost, expenses, and fees in this behalf expended."

This is a classical case of civil contempt in which the trial court places a recalcitrant party under penalty until he complies with a court order and then orders payment by the contemnor of the out of pocket expenses of the other party occasioned by the failure to comply with the court's order and the proceeding to bring about an end to the failure or refusal. *Dow Chemical Co. v. Chemical Cleaning Inc.*, 434 F.2d 1212 (5th Cir. 1970), *cert. denied*, 402 U.S. 945, 91 S.Ct. 1621, 29 L.Ed.2d 113 (1971).

The judgment is affirmed.